No. 12,457

IN THE

United States Court of Appeals

For the Ninth Circuit

KURT ADOLPH TAUCHEN,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,

Appellee.

BRIEF ON BEHALF OF APPELLANT

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TABLE OF AUTHORITIES CITED

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This is an appeal from an Order of the United States District Court for the Northern District of California, Southern Division, denying appellant's Petition for Naturalization, and a further Order denying appellant's Motion to Alter Said Judgment.

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court of the United States herein is based upon the following statutory provision:

> "Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States * * *."
>
> *United States Code,* Title 8, Section 701.

Appellant's petition herein (Record, page 2) was filed in the United States District Court for the Northern District of California, Southern Division, on May 6th, 1947. The said District Court, on October 14th, 1949, ordered appellant's petition denied (Record, page 12).

The appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit herein, is based upon the following statutory provision:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court."
>
> *United States Code, Title 28,* Section 1291.

The District Court's Order of October 14th, 1949 was a final decision of the District Court which may be reviewed on appeal in this court under the provisions of the jurisdictional statute last above quoted (*Tutun v. U. S.,* 270 U.S. 568; 70 L.Ed. 738; 46 S.Ct. 425).

The running of the thirty day period within which an appeal from said final decision was permitted by Rule 73(a) of the *Federal Rules of Civil Procedure* was ter-

minated by the filing, on October 20th, 1949, of a timely "Motion under FRCP Rule 59(e) to Alter Judgment" (Record, page 23), and the full time for appeal herein commenced to run from the entry, on December 8th, 1949, of an Order (Record, page 26) of the District Court denying said motion.

Within thirty days after the entry of said Order, to-wit: on January 7th, 1950, appellant filed with the District Court a Notice of Appeal (Record, page 29).

STATEMENT OF THE CASE

Appellant's Petition for Naturalization (Record, pages 2 to 5) sets forth that he was born in Berlin, Germany, on December 4th, 1906; acquired British citizenship by naturalization in 1937; and emigrated to the United States from England via Canada on August 26th, 1938. On May 7th, 1940, he formally declared his intention to become a citizen of the United States, and on May 6th, 1947, his present petition was filed, together with an Affidavit of Witnesses (Record, pages 5 and 6) stating that they had known appellant since September, 1944 and had personal knowledge that he was a person of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

On October 14th, 1949, the United States Immigration and Naturalization Service filed in the District Court a list of "Naturalization Petitions Recommended to Be Denied" (Record, pages 8 to 12) including a recommendation for the denial of appellant's petition because of failure to establish attachment to the principles of the Con-

stitution and good disposition to the good order and happiness of the United States.

Concurrently, the Immigration and Naturalization Service filed "Findings and Recommendations of Designated Examiner Immigration and Naturalization Service" (Record, pages 14 and 15) setting forth the findings of the designated examiner of the Immigration and Naturalization Service upon which the recommendation for the denial of appellant's petition was based.

Thereafter, on the same day, appellant testified in open court in support of his petition. As shown by the Transcript of testimony (Record, pages 16 to 22) and other evidence in the Record, appellant, Kurt Adolph Tauchen, was born in Berlin, German, on December 4th, 1906. He went to Austria, where he lived in Vienna until he was about 22 years of age, when he left Vienna to go to England. In 1937 he acquired British citizenship by naturalization.

He entered the United States lawfully for permanent residence on August 26th, 1938, and on May 7th, 1940 he formally declared his intention to become a citizen of the United States.

However, on December 9th, 1941, he was interned (Record, page 17) "as a potentially dangerous alien enemy" (Record, page 14), and he remained in the custody of the United States Government until December 7th, 1943, although at no time during his internment, or otherwise, was any charge of violation of any law of the United States ever brought against him (Record, page 20).

While appellant was confined in an internment camp under the circumstances described, the internees were

afforded the opportunity to volunteer to perform non-combatant services for the United States Army, and appellant so volunteered. During this time he worked at clearing artillery ranges, although other internees evidenced a hostile attitude toward him because of his having undertaken such work (Record, page 21).

Prior to his internment, appellant had repeatedly stated that he was willing to bear arms against Germany (Record, page 18). However, while in internment he was questioned on various occasions, and in response to certain of the questions propounded, he stated that he would not bear arms against Great Britain and Germany, putting his refusal on the grounds that despite his objections he had been classified as a German and a potentially dangerous alien enemy, and that he would not bear arms against Great Britain because it might be treason (Record, page 15).

At the hearing in the District Court on October 14th, 1949, appellant in response to questions propounded by the attorney for the Immigration and Naturalization Service again stated that his reason for not being willing to serve against Germany at the time that he was questioned during internment was that notwithstanding his prior expressions of willingness to bear arms against Germany, he had at that time been officially classified as a German and interned for two years as a German national, so that he thought that if he answered the question in the affirmative, he would be guilty of treason (Record, pages 18 and 19). He also repeated as his reason for not being willing to bear arms against Great Britain that he thought that if he answered such a question in the affirmative, he would be guilty of treason (Record, page 19).

He stated without qualification, however, that if he were admitted to citizenship on the pending petition he would be willing to bear arms against any country with which the United States might become involved in war (Record, page 20).

The United States District Court then entered an Order of Court (Record, pages 12 and 13) denying appellant's Petition for Naturalization on the ground of failure to establish that he had been attached to the principles of the Constitution and well disposed to the good order and happiness of the United States.

On October 20th, 1949, appellant filed in the District Court a motion under FRCP Rule 59(e) to alter judgment (Record, pages 23 to 25). In a memorandum of points and authorities appended thereto the attention of the District Judge was directed to certain authorities hereinafter discussed establishing that a claim of exemption from the draft laws on the ground of alienage was not evidence of lack of attachment to the principles of the Constitution, and pointing out that appellant, far from asserting any such broad claim of exemption, was merely assigning antecedent, and what he then believed to be presently subsisting, citizenship obligations as a ground for refusal to bear arms against countries to which such obligations were owed; being entirely willing to bear arms in behalf of the United States against any other country even prior to becoming a citizen of the United States, and being entirely willing to bear arms against any country without limitation upon becoming a citizen of the United States.

The District Court denied this motion in an Order (Record, pages 26 to 28) including an opinion assigning

the erroneous supposition that appellant's statements of the reasons for his unwillingness to bear arms against Germany and Great Britain were not given at the time he voiced the refusal, and basing the denial of the motion upon the supposition that his original statements made while in internment were deliberate and unqualified.

Questions Presented.

The present appeal, therefore, presents the following questions:

1. Can an alien rightfully be adjudged lacking in attachment to the principles of the Constitution solely because of unwillingness to bear arms, prior to admission to citizenship, against specified countries to which he believed himself obligated as a national under the doctrine of dual citizenship?

2. Was the trial court in error in finding as a fact that appellant's refusals to bear arms were unqualified when made?

3. Was the *res gestae* of applicant's statements, in fact, sufficient to rebut any judicial inference that such statements were motivated by lack of attachment to the principles of the Constitution?

SPECIFICATION OF ERRORS

1. The District Court erred in failing and refusing to hold, as a matter of law, that the assignment of antecedent and subsisting citizenship obligations as a ground for refusal to bear arms against countries to which such obligations are owed rebuts any inference that such refusal is motivated by lack of attachment to the principles of the Constitution of the United States.

2. The District Court erred in finding, as a fact, that appellant failed to assign as his reason for his statement that he would refuse to bear arms against Germany and Great Britain, at the time he made the statement, his antecedent and subsisting citizenship obligations to Germany and Great Britain.

SUMMARY OF ARGUMENT

All questions affecting appellant's qualifications for citizenship have been favorably passed upon in all respects save one; whether a statement of his unwillingness to bear arms against Germany and Great Britain was made under circumstances warranting a judicial determination that by it he demonstrated "lack of attachment to the principles of the Constitution."

The courts have the duty of acting in a purely judicial capacity in determining this question and, unlike the Congress, do not act as a matter of "sovereign grace."

Even a neutral alien cannot be adjudged to lack attachment to the Constitution for having asserted a lawful claim of exemption from military service.

Appellant asserted his unwillingness to bear arms against only two countries to which he owed antecedent obligations arising from birth and naturalization, and which obligations he believed to be subsisting when the assertion was made.

At the same time, he affirmatively demonstrated his good will toward this country by voluntarily performing noncombatant services, although interned and subjected to the hostility of other internees.

The trial court erroneously supposed that appellant unqualifiedly and without any explanation, refused to bear

arms against Germany and Great Britain, and the Record shows the error of that supposition.

Therefore, the present case does not require that this Court decide whether the trial court's application of the law to the supposed facts was or was not correct.

This Court is asked only to apply the law to the true facts as shown by the Record herein.

On such a basis, the Order denying appellant's petition for naturalization should be reversed.

ARGUMENT

The questions presented by this appeal can be approached only upon the basis of an understanding of the proper functions of the Congress, the Immigration and Naturalization Service, and the Courts, respectively, in determining the eligibility of aliens for naturalization.

The Congress may grant or withhold the privilege of naturalization at its will, for its act is one of sovereign grace, and no alien acquires a vested right to citizenship merely by arrival on our shores (*U. S. v. Rosika Schwimmer,* 279 U.S. 644; 79 S.Ct. 448; 73 L.Ed. 889).

The Court, unlike the Congress, does not act as a matter of sovereign grace. When the Congress has determined that aliens possessing certain qualifications may be admitted to citizenship by certain courts, the court exercises only the judicial function of determinng whether an applicant possesses those qualifications or not (*In re Fordiana,* 98 Conn. 435; 120 Atl. 338, 339).

The views of the Immigration and Naturalization Service, which administers the laws relative to naturalization, carry great weight and are entitled to earnest considera-

tion, but they are not binding upon the court (*Petition of Zogbaum,* 32 Fed.(2d) 911, 913).

Finally, the Court of Appeals is not bound to accept an ultimate finding or conclusion of the District Court as to a petitioner's failure to sustain the burden of proof of establishing his attachment to the principles of the Constitution (*Stasiukevich v. Nicholls,* 168 Fed.(2d) 474).

In the present case all questions affecting appellant's qualifications for citizenship have been favorably passed upon in all respects save one; and that is that his statement that he would be unwilling to bear arms against Germany or Great Britain, made under the circumstances shown by the record herein, was such conclusive evidence that he was not attached to the principles of the Constitution nor well disposed toward the good order and happiness of the United States, that, in the judicial discretion lodged in the court, his petition must be denied (*Tutun v. United States,* 12 Fed.(2d) 763, 764 (C.C.A. 1; 1926).

Evidence of Unwillingness to Bear Arms Is Not Evidence of Lack of Attachment Where Petitioner Is Exempted by Law.

Any diversity of opinion on the question of the power of a naturalization court to hold a *lawful* unwillingness to bear arms as a bar to naturalization, by construing such a refusal as evidence of "lack of attachment to the principles of the Constitution," has been settled, so far as this Circuit is concerned by this Court's decision in *United States v. Siem,* 299 Fed. 582, which has since been cited and followed by the First Circuit in *Tutun v. United States,* 12 Fed.(2d) 763.

In the *Siem* case the petitioner for naturalization was a declarant neutral alien who had claimed exemption in the draft of 1917 on the ground of alienage, but had been rejected as physically unfit apparently without his claim of exemption for alienage being passed upon. At the subsequent hearing on his petition for naturalization it was urged that his claim of exemption on the ground of alienage manifested that he was not "attached to the principles of the Constitution." District Judge Borquin overruled this contention in *In re Siem,* 284 Fed. 868; the opinion in which is so pertinent to the present case that if quoted at all herein it would have to be quoted in full.

The United States then filed a petition to set aside the certificate of naturalization granted to Siem, and from a denial thereof appealed to this Court, which affirmed the District Court in *United States v. Siem,* 299 Fed. 582.

In the *Tutun* case the petitioner for naturalization had claimed exemption from the World War I Selective Service Act on account of his alienage, and the District Court denied him admission to citizenship solely upon the ground that such a claim of exemption proved that he was not "attached to the principles of the Constitution."

The petitioner appealed from this ruling, and in its opinion (*Tutun v. U. S.,* 12 Fed.(2d) 763) the Circuit Court of Appeals, citing this Court's decision in the *Siem* case, reversed the District Court and squarely held that even the "wide discretion * * * lodged in the judge who hears a petition for naturalization" could not be exercised to raise as a bar against a petitioner for citizenship a lawful claim of exemption from military service which Congress had not seen fit to declare disqualifying.

Appellant's Unwillingness to Bear Arms Was Not Only Lawful but Obligatory.

Bearing in mind that when appellant was questioned, during his internment, concerning his willingness to bear arms against Germany and against Great Britain, the question was manifestly answered by him with reference to his nationality at the time he was questioned, there can be no question but that his negative answer was consonant with the laws of the United States and at the same time obligatory under both moral and international law.

He was, at that time, classified by the United States as an enemy alien (Record, page 14), because of his birth in Germany, and had been interned as such without any charge of violation of any law of this country ever having been brought against him (Record, page 20).

Being so *classified,* he was ineligible for induction into the armed forces of the United States under the *United States Code,* Title 50, Appendix Section 303(a).

Also, appellant was at that time a citizen of Great Britain; having acquired such citizenship by naturalization in 1937 (Record, pages 2 and 17). Since the question as to appellant's willingness to bear arms against Great Britain necessarily presupposed the existence of a state of war between the United States and Great Britain, appellant would have been ineligible for induction under such circumstances by the terms of the same statutory provision.

Therefore, appellant's unwillingness to bear arms against Germany and Great Britain was not only legally justified by his *alien* status, in the same way that the claimed exemptions of the neutral alien petitioners in the *Siem* and *Tutun* cases, *supra,* were legally justified; his

enemy alien status rendered him wholly ineligible so to bear arms against these countries.

Furthermore, since municipal law determines how citizenship may be acquired and divested, and it follows that persons may have a dual nationality (*Perkins, Secretary of Labor, et al. v. Elg,* 307 U.S. 325, 329), appellant, at the time he was questioned during his internment, had reasonable cause to believe that the implementation, or perhaps even the expression, of any willingness to bear arms against either Germany or Great Britain might subject him to criminal penalties for treason should he, in the future, become subject to the jurisdiction thereof.

Even should he remain outside the jurisdiction of the countries against which such an offense was committed, the mere commission of the offense would be a dishonorable act. As stated by Judge Borquin in *In re Siem, supra*:

> "For petitioner to acquiesce in draft into federal military service would be infidelity to and an offense against Norway—a poor recommendation to citizenship in this country. Unfaithfulness to Norway might be followed by unfaithfulness to this country. The better citizen to Norway, the better to this country."

Any Unfavorable Inference from Appellant's Statement Is Negatived by His Voluntary Non-Combatant Service.

While it is thus demonstrated that appellant's statement respecting his unwillingness to bear arms against Germany and Great Britain does not constitute a *legal* basis for holding that he lacked attachment to the principles of the Constitution, the lack of any *factual* basis for such a holding is demonstrated by the testimony that he stated his willingness to serve against Germany "in every

way except for combatant services'' (Record, page 18), and that he actually did volunteer for and work at clearing artillery ranges for the Army, notwithstanding that by so doing he incurred the hostility of other internees (Record, page 21).

The Trial Court's Opinion Assigns an Erroneous Supposition as Distinguishing the Present Case from Those Cited Herein.

The initial Order of Court (Record, page 12) herein, did not include any opinion. The later Order (Record, pages 26 to 28) did.

In this opinion, the trial court made it clear that it regarded the testimony given by appellant at the hearing of October 14th, 1949 as an afterthought, and not as a repetition in substance of what he had said, during his internment, at the time he stated his unwillingness to bear arms. In this connection the Court said:

> ''We must look to petitioner's statements when made to determine his then attitude. His present explanations and elaborations are relevant but not controlling. His former declarations were unequivocal. * * * If the statements he then made did not convey his thoughts, he could have qualified them. The interpretation he now gives should have been given then if what he said did not express his attitude.''
>
> * * * * * * *
>
> ''He deliberately stated that he would not bear arms against two designated foreign countries. This shows lack of attachment to the principles of the Constitution and a disposition other than to the good order and happiness of the United States.''

The Record Shows the Error of This Supposition.

The "Findings and Recommendations of Designated Examiner Immigration and Naturalization Service" (Record, pages 14 and 15) filed at the hearing of this case in the trial court and before the oral testimony was given, state:

> "While in internment he stated that he would not bear arms gainst (sic) Great Britain and Germany.
>
> "He is not a conscientious objector but *put** his refusal on the grounds that, despite his objections, he had been classified as a German and a potentially dangerous alien enemy. He would not bear arms against Great Britain because it might be treason."

The testimony given by appellant in court on this particular point was as follows:

> "Q. What was your reason for not being willing to serve against Germany?
>
> A. I must, in order to make myself understood, I must say, before I was interned I was asked on repeated occasions if I was willing to bear arms against Germany and every occasion I answered in the affirmative. But after I was officially classified a German, I was was interned for two years as a German National. Then I thought if I answered the question in the affirmative I would be guilty of treason.
>
> Q. And what was your reason for not being willing to bear arms against Great Britain?
>
> A. That was also the reason in the case of Great Britain" (Record, pages 18 and 19).

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*The choice of the past tense is emphasized here as referring to "while in internment."

CONCLUSION

The present case does not require that this Court decide whether or not the conclusion of the trial court on the question of attachment to the principles of the Constitution was a correct deduction from the supposed facts stated in the Court's opinion. What is presented to this Court is a clear demonstration that the trial court misconceived undisputed and important facts of the case, and based its conclusion upon a supposition which is contradicted by the record.

Therefore, appellant does not challenge the established rules that the burden of proving attachment to the principles of the Constitution is upon one who petitions for naturalization, and that the finding of a trial court with respect to lack of attachment will seldom be disturbed by an appellate court.

He asks only that the question of attachment be adjudicated in the light of the true facts and not upon the basis of an erroneous supposition.

It is submitted that appellant's statement, prior to admission to United States citizenship, that he was unwilling to bear arms against Germany and Great Britain while he remained bound by the obligation of nationality to those countries, was not evidence of "lack of attachment to the principles of the Constitution," because:

(a) Appellant was not only exempted from, but was ineligible under the laws of the United States for, such service; and

(b) It was clearly motivated by respect for both the moral and municipal law which universally condemns treason.

Appellant therefore submits that the Order denying his Petition for Naturalization should be reversed.

Respectfully submitted,

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Attorney for Appellant.